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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 526

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants;

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

MOTION TO DISMISS OR AFFIRM

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 529

EARL C. SYLVANDER, MARGARET C. SYLVANDER, FRED L. EAMES, S. H. TERRY and JOHN O. YOUNG, individually and on behalf of all other stockholders similarly situated,

Appellants,

v.

FARMERS AND TRADERS LIFE INSURANCE COMPANY, LOUIS J. TABER, EDWIN W. HENNE, H. B. DOUST, HARRY A. CATON, ALVIN E. HANSON, GEORGE M. LEWIS, WALTER L. WEEDEN, D. EATON ALVORD, KENZIE S. BAGSHAW, BEATTY H. DIMIT, HARRY A. DUNSMOOR, FRED J. FREESTONE, CLARENCE E. JOHNCOX, JAMES B. KIRBY, B. BURDETTE LEE, GRANT T. LITTLE, HENRY D. SHERWOOD, BENJAMIN E. SHOVE, CLARENCE H. TWICHELL, and HELEN E. HAYES, as Administratrix of Estate of Lester D. Hayes,

Appellees,

and

LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Intervenor-Appellee.

On Appeal from the Court of Appeals of the State of New York.

MOTION TO DISMISS OR AFFIRM

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, appellee herein, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves this court to dismiss or affirm with costs the appeal taken herein to this court by Earl C. Sylvander, *et al.*, appellants, upon the ground that there is no substantial federal question involved.

Dated: New York, N. Y., December 8, 1960.

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Appellee *pro se*.

Opinions Below

The opinion of the New York Supreme Court, Onondaga County, dismissing the complaint herein, is reported in 19 Misc. 2d 1005, 188 N.Y.S. 2d 368.

The Appellate Division, Fourth Judicial Department, and the New York Court of Appeals, affirmed without opinion. The decision of the Appellate Division is reported in 9 A. D. 2d 1019, 196 N.Y.S. 2d 592. The Court of Appeals' judgment is annexed to appellants' jurisdictional statement at pages 28a-30a.

Jurisdiction

This is an appeal from a judgment of the Court of Appeals of the State of New York, dated May 19, 1960, which unanimously affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Judicial Department, dated January 6, 1960, which had affirmed a judgment of the Supreme Court, Onondaga County, dated May 7, 1959, dismissing the complaint herein. Appellants contend this Court has jurisdiction on the ground that substantial constitutional questions are presented. Appellees respectfully contend that such issues are insubstantial and utterly devoid of merit.

Statute

The statute involved in this appeal is § 199 of the Insurance Law of the State of New York.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL OR AFFIRM

Appellants appeal from a judgment of the Court of Appeals of the State of New York which unanimously affirmed a judgment of the Appellate Division of the Supreme Court, Fourth Judicial Department, which had affirmed a judgment of Onondaga County Supreme Court, dated May 7, 1959, dismissing the complaint herein. This is an action for a judgment declaring invalid a plan under which appellee Farmers & Traders Life Insurance Co. (herein called "Farmers") sought to convert from a stock to a mutual insurance company, and the statute authorizing such a plan.

Since appellants' complaint alleged the unconstitutionality of a statute, Insurance Law § 199*, the Attorney General intervened by consent on December 17, 1958.

Introduction

Appellants own 157 shares of stock in Farmers, which was incorporated in 1912 and has 3000 shares outstanding. The shares held by appellants were purchased since 1934 at the earliest. On May 15, 1954 the directors voted to convert Farmers from a stock to mutual company pursuant to Insurance Law § 199. As required by that statute, the plan was approved by a majority of the shareholders at a meeting on July 19, 1954, and by a majority of the policyholders voting at a meeting on August 31, 1954. The New York State Superintendent of Insurance approved the plan after a complete investigation and after affording counsel for appellants ample opportunity to be heard in opposition to the plan.

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* Unless otherwise specified, all statutory references are to the New York Insurance Law.

Thereafter three voting trustees were appointed, pursuant to § 199, subd. 3, and all shares turned in under the plan were conveyed to them. These amounted to 92% of the total shares. Each shareholder turning in his stock received a "mutualization certificate" for the value of each share, to be paid out of the accumulated net earnings of the company's non-participating business. Each payment required the approval of the Superintendent of Insurance.

State Proceedings

Appellants' complaint alleged seven causes of action, of which two involved questions arising under the United States Constitution, as follows:

(1) that § 199 unconstitutionally impairs the obligation of contracts (Art. I, § 10); and

(2) that § 199 acts as a deprivation of property without due process of law and as a denial of the equal protection of the laws (Amend. XIV).

The opinion of the Onondaga County Supreme Court (*McClusky*, J.), annexed to appellants' jurisdictional statement at pages 1a-17a (reported 19 M. 2d 1005), extensively discussed the law applicable to the contentions here at bar, and found no impairment of any contractual obligation or violation of the Fourteenth Amendment. The Court noted that former Insurance Law §§ 16 and 95, the direct predecessors of § 199, which were in force prior to the existence of Farmers, authorized mutualization, and that General Corporation Law § 5 empowers the Legislature to alter, suspend or repeal the charter of every corporation. It went on to hold (Jur. Statement, p. 12a), referring to § 199:

> "There is nothing abhorrent in such a provision. Subsequently the law was amended to provide more in detail how the stock was to be handled pending

final mutualization. The general prohibition in the first part of the section was limited by the proviso. Evidently the Legislature recognized the existence of a potential problem and tried to meet it. At its worst it was a provision relating to the internal management of the corporation and, therefore, particularly subject to legislative alteration. By no stretch of the imagination did it constitute an impairment of any contract between the State and the corporation or its stockholders."

As the Court held, the law in effect at the time the stock was issued contained "the seeds of mutualization", Jur. Statement, page 13a, and therefore no existing contractual obligation could conceivably have been impaired.

Appellants' contentions based on the due process clause were similarly found to be unworthy of consideration. The court held (Jur. Statement, p. 14a):

> "No stockholder in an insurance company is under any illusion. He knows or should know that his stock may be mutualized by the very law which gave the insurance company being. The enactment of amendments to the statute did not impair any contract with the corporate entity or the stockholders."

On appeal, the judgment of the Supreme Court was affirmed unanimously, without opinion, by the Appellate Division, Fourth Judicial Department, and by the New York Court of Appeals.

No Substantial Federal Question is Involved in the Instant Appeal; Nor is There Any Substantial Merit

Appellants assert that three questions are presented by this appeal. (Jur. Statement, pp. 3-4.) It is submitted that none present issues under the Constitution of a nature

substantial enough to warrant any further consideration by this Court.

The due process contention of appellants that § 199 is violative of the Fourteenth Amendment in that it authorizes a mutualization plan depriving dissenting shareholders of their property is without merit. Ever since *German Alliance Ins. Co.* v. *Lewis*, 233 U. S. 389, it has been clear beyond cavil that the insurance industry affects the public interest to an extent justifying regulatory legislation of a far-reaching nature. Cf. *O'Gorman & Young, Inc.* v. *Hartford Fire Ins. Co.*, 282 U. S. 251; *California Auto. Ass'n* v. *Maloney*, 344 U. S. 105, 109.

The statute here challenged was enacted in 1906 after lengthy hearings by the Armstrong Committee, which was investigating abuses in the field of life insurance. The committee concluded the policyholders, with a far greater financial stake than shareholders, should be awarded a commensurate voice in management through voluntary mutualization. Proposals for compulsory mutualization were rejected, the committee believing the preferable course to be voluntary conversion with "[s]uitable safeguards • • • so that the plan of retirement should not deprive any stockholder of property without his consent • • •." Report of Armstrong Committee (N. Y. Ass. Doc. No. 41 [1906]).

The New York statute, formerly § 95 and now § 199, has been the prototype of similar provisions in 17 other jurisdictions, all of which have been upheld as constitutional whenever challenged. See, e.g., *Belden* v. *Union Central Life Ins. Co.*, 143 Ohio St. 329, 55 N. E. 2d 629, app. dism. 323 U. S. 674; *Ohio National Life Ins. Co.* v. *Struble*, 82 Ohio App. 480, 81 N. E. 2d 622, app. dism. 150 Ohio St. 409, 82 N. E. 2d 856; *Application of Prudential Life Ins. Co.*, 132 N. J. Eq. 170, 28 A. 2d 120.

Moreover, the constitutionality of §§ 16 and 95, the predecessors of § 199, was sustained in *Royal Trust Co.* v. *Equitable Life Assur. Soc'y*, 247 Fed. 437 (2nd Cir.).

Appellants' further contention (Jur. Statement, p. 4) calls into question a 1939 amendment to § 199 which requires the price fixed by the mutualization plan to be adhered to. The assertion that this somehow impairs contractual obligations was never made below and is a mere afterthought pressed for the first time here. While this is reason enough to disregard the argument, it should be noted that appellants conceded in their brief in the Court of Appeals, at page 68, that "[t]he changes made by Ch. 882 Laws of 1939 and Ch. 708 Laws of 1955 now § 199 do not basically change the principles involved *and for the purposes of this litigation are substantially the same as the Laws of 1917*" (emphasis added).

Further, the amendment complained of does not injure appellants since, as the courts below found, the plan does not compel any shareholder to sell his interest. It merely acts to prevent a small group of dissidents from refusing to sell and then extorting a disproportionate sum for its shares—a legislative purpose valid beyond cavil.

The final question asserted by appellants to merit this Court's consideration concerns the 1917 amendment of former § 95, presently § 199, subd. 3. This change authorized the transfer of shares acquired by a company under a mutualization plan to three voting trustees named in the plan and approved by the Superintendent of Insurance, who are empowered to vote the stock and to receive dividends in trust for the benefit of the policyholders. Appellants contend this provision impairs contractual obligations and deprives dissenting shareholders of their property without due process of law (Jur. Statement, p. 4).

The stock owned by appellants was purchased long after 1917, so it is difficult to see what right was impaired. It is manifest that shares are issued subject to any existing law, and appellants, or their predecessors in interest, had constructive or actual knowledge of the statute they now assail. *Ohio National Life Ins. Co.* v. *Struble, supra; Garzo* v. *Maid of the Mist Steamboat Co.*, 303 N. Y. 516, 523.

Moreover, as the court below found, the record is barren of proof that appellants' shares were even *issued* prior to 1917. Therefore no possible right of appellants could conceivably have been invaded by the 1917 statute.

The necessity for the amendment in issue is amply demonstrated by the Annual Report of the New York Superintendent of Insurance, March 1, 1917, at page 13:

> "• • • no stockholder could be compelled to surrender his stock for cancellation, and accept the price provided in the plan, if he saw fit not to do so. It is therefore possible, under the present law, for a dissenting or unwilling stockholder, owning but a small portion of the outstanding stock, providing the greater portion has been retired under the plan, to absolutely control the company."

This provision impairs appellants' voting rights in no way, since before the plan they had 157 votes out of 3,000, and this they still have. Their objection appears to be that the statute denies them a controlling interest to which they are not entitled. The voting trust procedure was enacted to prevent the very result appellants demand. It is difficult to see how a statute which does not alter one's position with respect to the company may impair one's "vested rights".

It is to be noted that Farmers had the power to enfranchise its policyholders pursuant to § 199, subd. 1, a provision antedating the incorporation of the company, originally enacted in 1909. This would, of course, have diluted appellants' voting rights *pro tanto*. Yet it was not done.

Furthermore, it is clear that a mere change of detail or procedure may not act as an impairment of vested rights so long as the substance of the statute existed prior to incorporation. *Garzo* v. *Maid of the Mist, supra; Hinckley* v. *Schwarzschild & Sulzberger Co.*, 107 App. Div. 470 (1st

Dept.), app. dism. 193 N. Y. 599. The court there held, at page 478:

> "• • • [A]cts which do no more than regulate and control the internal management of a corporation, so far as it has relation to the public and concerns the power of the State, are within the power to alter and reveal, even though the exercise of the power adds to the burden of the stockholder by increasing his liability, or diminishes the value of his stock, or changes the name, offices or proportion in management and control of the corporation. Within this rule must necessarily fall the right to change the capital stock of the corporation as to amount, kind and classification."

It is manifest that the Constitution offers no guarantee of absolute protection from legislative changes in corporate structure. It is to be presumed, moreover, that the Legislature inquired and found the need for the regulatory statute in question. *U. S.* v. *Carolene Products Co.*, 304 U. S. 144. And the record is replete with proof that the enactment of the statutes at bar was the result of exhaustive inquiry. It is clear that no violation of the due process or impairment of contract clauses has been shown.

The cases relied on by appellants are inapposite. *Ohio State Life Ins. Co.* v. *Clark*, 274 F. 2d 771 (6 Cir.), cert. den. 363 U. S. 828, cited in support of appellants' arguments, concerned a statute, enacted subsequent to the purchase of insurance policies, which permitted shareholders to obtain beneficial ownership of the company's surplus. The court there concluded this was an impairment of the policyholders' vested rights. Here, however, appellants are being deprived of nothing through the operation of § 199. They are not compelled to convey their shares, as is the law in Ohio, New Jersey, and other states. Nor are their voting rights affected by the conveyance of other shares to the trustees.

This court has held that its jurisdiction does not extend to cases raising questions foreclosed by previous decisions. See, e.g., *Minneapolis, St. P. & S. S. M. Ry.* v. *C. L. Merrick Co.*, 254 U. S. 376. The law is settled as to each of appellants' contentions, and no merit exists as to any.

It is manifest that appellants fail to set forth any substantial ground for attacking the validity of § 199. Therefore we respectfully urge that this appeal be dismissed.

CONCLUSION

The appeal should be dismissed, or affirmed, with costs.

Dated: New York, N. Y., December 8, 1960.

Respectfully submitted,

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